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No. 585

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

FEDERAL POWER COMMISSION,
Petitioner,

vs.

AMERADA PETROLEUM CORPORATION,

and

SIGNAL OIL AND GAS COMPANY.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR AMERADA PETROLEUM CORPORATION IN OPPOSITION

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AMERADA PETROLEUM CORPORATION,

and

SIGNAL OIL AND GAS COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR AMERADA PETROLEUM CORPORATION IN OPPOSITION

Comes now Amerada Petroleum Corporation (Amerada), Respondent herein and opposes the petition for writ of certiorari filed by the Federal Power Commission (Commission), No. 585.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit (Pet. App. A, 11-27) is reported at 334 F.2d 404. The opinion and orders of the Federal Power Commission (R. 242-265, 284-285) are reported at 30 FPC 200 and 677.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition at pages 1 and 2.

QUESTIONS

1. Is a sale of natural gas which is produced, transported, sold and consumed wholly within the State of North Dakota transformed from an intrastate sale into an interstate sale merely because the intrastate volumes sold, are, before being withdrawn by the North Dakota towns along the way, commingled in a 12 inch pipeline with gas which will be transported into Montana for resale?

2. In the face of a final, unappealed judgment by the Court below involving the same issue, the same material facts, and the same parties (including the Commission), where it was adjudged and decreed that a sale of gas, produced in North Dakota, for consumption in certain North Dakota towns, though commingled in route before delivery, was an intrastate sale—Is the Commission precluded from relitigating anew the same question involving the same material facts and the same parties?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act (52 Stat. 821, 15 U.S.C. Sec. 717-717w) are set forth in the Petition at pages 2 and 3.

STATEMENT

This case involves the jurisdiction of the Federal Power Commission over the sale of a commingled stream of intrastate and interstate gas; it also involves outright Commission repudiation of a judicial decision solemnly rendered by the Court below 7 years ago, and the Commission's flat refusal to be bound thereafter by the judgment there rendered, though it was the winning party, because in the Chairman's words, that case "was erroneously decided."[1] Because the prior litigation involved the *same* issue, the *same* material facts, and the *same* parties, though differently aligned, a brief resume of the earlier facts and circumstances will be an aid in understanding the case at bar.[2]

Amerada's Former Sales to MDU—On June 24, 1955, Amerada entered into a "firm gas" contract with Montana-Dakota Utilities Corporation (MDU) providing for the sale of certain gas from the tailgate of Signal Oil and Gas Company's (Signal) plant at Tioga, North Dakota. A like

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1. *Lo-Vaca Gathering Company*, 26 FPC 606, 615 (1961). The Commission below again embraced this language when quoting the Examiner (R. 251) and also repudiated the 1957 decision by the Court below because that "decision failed to take appropriate account" of certain facts. (R. 254).

2. All emphasis contained in this brief, whether in the text or in quoted materials, is supplied by the writers unless otherwise indicated.

contract was entered into between Signal and MDU on July 18, 1955, covering Signal's share of the gas. These contracts were for a twenty year term at a beginning price of 16¢ per Mcf delivered at the tailgate of the Tioga plant. No federal permit was requested for these contracts, as the "firm gas" was to supply the Tioga-Minot, North Dakota, line, and the North Dakota communities of Ray, Wheelock, Epping and Springbrook, and they were therefore regarded as *intrastate*.

On June 25, 1955, Amerada and MDU entered into a seven year contract whereby Amerada sold its "dump gas" to MDU at 9¢ per Mcf delivered at the tailgate of the Tioga plant. On July 19, 1955, Signal and MDU entered into a similar contract for "dump gas" at a similar price. The "dump gas" sold under both contracts was admittedly for resale in interstate commerce, and accordingly such contracts were within the jurisdiction of the Federal Power Commission.[3]

It was contended *then* by the Public Service Commission of the State of North Dakota, as *now* by the Commission, that the commingling of the *intrastate* gas sold under the "firm gas" contracts with the *interstate* gas sold under the "dump gas" contracts resulted in giving the Federal Power Commission jurisdiction over the entire commingled stream. The Court of Appeals for the Eighth Circuit held to the contrary.[4]

Amerada's Present Sales to MDU—Subsequent to the execution in 1955 of the "dump" and "firm" gas contracts,

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3. The foregoing statement of facts regarding the four 1955 contracts is taken from the opinion in *State of North Dakota* v. *Federal Power Commission*, 247 F.2d 173, 174 (8th Cir. 1957).

4. *State of North Dakota* v. *Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957).

Amerada made additional discoveries of oil well gas (R. 23) and gas well gas (R. 6) and enlarged the productive area. Because the "firm gas" contract only covered the gas required to supply the communities on the Williston-Minot line (R. 16) and the "dump gas" contract did not dedicate any reserves to MDU on a permanent basis (R. 21) MDU entered into two new contracts with Amerada for the purchase of additional gas to meet the demands of its expanding markets.

The first of these, the North Dakota Contract dated December 21, 1960, provides for the sale of gas produced from certain North Dakota fields with delivery to be made, as before, at the tailgate of the Tioga plant; it has a twenty year term and a beginning price of 17¢ per Mcf (R. 126-151). By its terms, Amerada will sell to MDU a part of the gas which MDU will need to supply the North Dakota communities located along and served by the MDU pipeline system, including the communities which will be served by MDU's new 106-mile line connecting Minot and Bismarck, North Dakota (R. 129). The map inserted in the Court's opinion below (Pet. App. A 15) will aid the Court in visualizing the MDU pipeline system. The North Dakota Contract supersedes the earlier intrastate "firm gas" contract, which only provided for the purchase and sale of limited volumes of gas in a limited market area (R. 16).

The North Dakota Contract provides that all gas purchased thereunder by MDU "shall be transported, used and consumed entirely *within* the State of North Dakota" (R. 130), and "shall not, at any time, cover the sale or delivery by Amerada of any gas which is *transported beyond the boundaries* of the State of North Dakota" (R. 132). These and other provisions (R. 130) make it clear that the parties considered this transaction as one over which the Federal Power Commission had no jurisdiction. Amerada did not,

therefore, request the Federal Power Commission to issue it a certificate of public convenience and necessity.

On January 10, 1961, about three weeks later, Amerada and MDU entered into a separate and distinct Interstate Contract providing for the sale to MDU of additional volumes of gas, also, as before, to be delivered at the tailgate of the Tioga plant; it had a term of twenty years and a beginning price of 17¢ per Mcf (R. 97-123). It obligated Amerada to complete a sufficient number of gas wells, not exceeding four in number, to make available to MDU 25,000 Mcf per day of gas well gas (R. 101-102). This contract envisioned Commission jurisdiction; it required Amerada to secure a "certificate of public convenience and necessity and any other necessary approvals from the Federal Power Commission for the sale of gas under this agreement" (R. 101). On August 28, 1962, the Commission granted to Amerada a certificate of public convenience and necessity with respect to this sale (R. 214).

On January 16, 1961, Signal and MDU entered into a North Dakota Contract, and on January 18, 1961, they entered into an Interstate Contract, both of which contained terms and provisions which in large measure are similar to those contained in the Amerada-MDU contracts (R. 24).

Both Amerada and Signal agreed in the certificate proceeding not to apply to the Commission for abandonment of their "dump gas" contracts because if circumstances ever arose in which "flare gas" was available, it could be sold under the "dump gas" contracts (R. 26-27).

Additional Supplies of Gas to MDU—In addition to the four Amerada and Signal contracts just described, two other companies also contracted to supply gas to MDU into that segment of its pipeline (only about 85 miles in length) which runs from Tioga, North Dakota, to Sidney, Montana,

which is just across North Dakota's western border (R. 29). Thus, Hunt-Herbert and The TXL Oil Corporation (now Texaco) sell gas to MDU from their respective gasoline plants located northeast of Tioga, North Dakota (R. 197). The Hunt-Herbert contract was entered into March 27, 1961 (more than three months *subsequent* to Amerada's North Dakota contract) and Hunt-Herbert did not file its application for a certificate until May 11, 1961; the TXL contract was entered into on March 9, 1961 (also approximately three months *after* the date of Amerada's North Dakota contract) and TXL did not file its application for a certificate until May 23, 1961.

MDU entered into but *one* contract with Hunt-Herbert for the sale of its gas and likewise entered into but a *single* contract with TXL. Both of these contracts admittedly constitute sales of gas for resale in interstate commerce. Both sellers applied for and were granted certificates of public convenience and necessity by the Commission (R. 213). Approximately 5,000 Mcf of gas per day is delivered to MDU by Hunt-Herbert, and approximately 10,000 Mcf per day is delivered to MDU by TXL (R. 29). None of the gas purchased from Hunt-Herbert and TXL will be delivered or transported through the eastern segment of MDU's pipeline which runs from Tioga to Minot; only Amerada and Signal gas will travel eastward to Minot (R. 7, 12, 13). All of the Hunt-Herbert and TXL gas will flow westward toward the Montana border (R. 13).

On a peak winter day, MDU will purchase 70,000 Mcf of North Dakota produced gas; 55,000 Mcf will be purchased from Amerada and Signal, 10,000 Mcf from TXL, and 5,000 Mcf from Hunt-Herbert (R. 29). Of the 55,000 Mcf supplied under the Amerada and Signal contracts, 50,000 Mcf will flow to the *east* and will be consumed in the North Dakota towns which lie along MDU's line from Tioga to

Minot, to Bismarck, etc. (R. 29). Amerada and Signal will supply 5,000 Mcf of gas which will flow to the *west*, which will be commingled with the 15,000 Mcf of gas supplied by Hunt-Herbert and TXL. Of this amount, 10,200 Mcf will be consumed within the State of North Dakota by the consumers in the towns lying along the western segment of the line (R. 233).

Determination of Intrastate Volumes by Separate Measurement. The *uncontroverted* testimony of Mr. Lawrence H. Armstrong, Gas Engineer for MDU, concerning the separate measurement and metering of intrastate gas was in part as follows:

> "Two separate metering stations *will continue* to measure the quantity of gas which flows from the Tioga plant. One station will measure the quantity of gas which flows westward toward Williston, North Dakota, and Fairview, Montana; the other station will measure the quantity of gas which flows eastward toward Minot, North Dakota, . . . Metering stations will also be installed to separately measure the quantity of gas delivered by Lyda Hunt-Herbert Trusts et al. and the TXL Corporation, from the North Tioga and Lignite plants into Montana-Dakota's system. The *proportion* of the gas stream flowing westward and eastward from Tioga which is supplied by Amerada and Signal *will therefore be known at all times*. The *amount* of North Dakota gas which is *consumed in North Dakota, before leaving the state*, will be *separated* from the gas stream in these two branches of the main line and will be *measured at each town gate* before *any portion of either stream leaves the state of North Dakota*.
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> ". . . *we will know the quantity of gas* which is *produced* in North Dakota and *withdrawn* from each branch of the main line and which is *consumed* in North Dakota *before it leaves the state*." (R. 3-4).

Decisions Below—In a 3 to 2 opinion the Commission, relying on its own decision in *Lo-Vaca Gathering Company*, 26 FPC 606 (subsequently set aside 323 F.2d 190 (5th Cir.)), certiorari granted 377 U.S. 951, held—because gas sold in *interstate* commerce by Hunt-Herbert and TXL and gas sold in *intrastate* commerce by Amerada and Signal was commingled in the 85-mile segment of MDU's pipeline running west from Tioga to the Montana border—that the sale, of *all* volumes under Amerada's North Dakota contract (including that considerable volume flowing to the east) was converted into a sale for resale subject to the jurisdiction of the Commission. The Commission distinguished *North Dakota* v. *Federal Power Commission*, 247 F.2d 173 (8th Cir.), on the grounds that gas from additional sources (Hunt-Herbert and TXL) is now being commingled with the Amerada and Signal gas (R. 249-250). But more significantly, the Commission *refused* to follow and *refused* to be bound by that decision; instead it embraced its earlier depiction of that case saying that it "was erroneously decided" (R. 251).

The Court below, in a *unanimous* opinion, relying primarily on its own earlier opinion in *North Dakota*, and on this Court's opinion in *Peoples Natural Gas Company* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550 (1926), which it found to be in point "four square" *set aside* the Commission's opinion[5] on two distinct grounds, to-wit:

> 1. "If the commingling of interstate and intrastate gas in the former case did not deprive the state

5. The Court also relied on *City of Hastings, Nebraska*, v. *Federal Power Commission*, 221 F.2d 31 (App. D.C. 1954) cert. denied 349 U.S. 920 (1955); *Lo-Vaca Gathering Company* v. *Federal Power Commission*, 323 F.2d 190 (5th Cir. 1963) cert. granted 377 U.S. 951 (1964).

of regulatory jurisdiction, then the mere induction of additional interstate gas from other sources would not have that effect now.

* * *

"Congress, not the contracts, has exempted the Commission's jurisdiction in this instance. Neither the Commission nor this court has the authority to expand the Commission's jurisdiction." (334 F.2d 404, 411).

2. "In our former opinion, we fully adjudicated and decided the same issue recurring now under equivalent circumstances that the Commission lacks jurisdiction to regulate gas produced, sold, and consumed intrastate, which is transported in a pipeline commingled with interstate gas and that decision as between these parties bars resurrection of the issue again." (334 F.2d 404, 412).

ARGUMENT

I.

The Case at Bar Is Not Controlled by Lo-Vaca.

Proclaiming that the Court below "relied largely upon the reasoning of the 5th Circuit" in *Lo-Vaca* (Pet. 8), now pending on writs of certiorari Nos. 46, 47 and 57, this Term, the Commission devotes only one short paragraph and gives but a single reason for granting certiorari in the case at bar. That reason, says the Commission, is that this case "presents the same question" as *Lo-Vaca* (Pet. 8). It then urges this Honorable Court, for "the reasons set forth in [its] brief in *Lo-Vaca*" to reverse the Court below. The Commission is mistaken. We shall so demonstrate.

The Court Below Did Not "Rely Largely" on Lo-Vaca. The Court below, though citing *Lo-Vaca* as being

consistent with its earlier decision in *North Dakota*, did not place primary reliance upon *Lo-Vaca*. Only 7 years earlier in *North Dakota* it had decided the *same* issue involving the *same* parties, and in view of this decision, there was simply no need to place extreme emphasis on *Lo-Vaca* and it did not do so. Indeed, because in *North Dakota* the *Commission itself* successfully pressed upon the Court below many of the same authorities and the same arguments which we made below, the Court's memory may have been awakened and perhaps it could still hear the forceful and ringing oral argument made by Counsel for the Commission in 1957, when he said:

> "You have a company operating under *two* separate contracts, . . . and even though the gas *is* taken from *interstate transportation facilities*, I don't think that nullifies the provisions of the *second contract* which provides for rates, for gas *produced* in North Dakota, *transported* in North Dakota and *consumed* in North Dakota."[6]

And that argument carried the day.

Moreover, in the opinion of the Court below, this Court's opinion in *Peoples* was "four square"[7] so it is simply wrong to say that the decision below rests upon *Lo-Vaca* and the Commission cannot, by so arguing, divert this Court's attention from the real issues in the case at bar.

There Is No Regulatory Gap in the Case at Bar. In *Lo-Vaca* the sale over which the Commission asserted jurisdiction was a sale to El Paso of gas to be used as fuel in compressors, treating plants, boilers, camps, and

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6. Transcript of Oral Argument before the Eighth Circuit in *North Dakota*, pp. 28-29.

7. 334 F.2d 404, 408.

other facilities outside of the State of Texas (Pet. 5 Lo-Vaca). The gas sold by Houston, over which the Commission also asserted jurisdiction, was to be used solely as fuel in the operation of El Paso's plant and a plant of Phillips Petroleum Company, both of which were located within the State of Texas (Pet. 6 Lo-Vaca). It was strenuously urged by the Commission in its petition for certiorari that the decision in that case:

> ". . . would create a serious gap in the comprehensive regulation which Congress has established for protection of consumers. No State could be expected to regulate a sale by a producer to an interstate pipeline for ostensible use in the latter's own operations. The producing State (here, Texas), though perhaps having the power, would have little interest in regulating an item of pipeline cost which would be reflected chiefly in the rates paid by consumers in other states. And the consuming States that might have an interest (here, New Mexico, Arizona and California) would have no power to regulate sales of gas outside their own borders. By its decision, the court below thus creates a class of sales by independent producers which are free from any effective regulation, either State or federal." (Pet. 18-19 Lo-Vaca).

In contrast to the foregoing, the gas sold under Amerada's North Dakota Contract will *not* be used by MDU in its own operations as fuel for compressors, treating plants, boilers or camps or for any other purpose. It will *not* be transported outside the state. Rather, the consumers living in the towns located along the MDU pipeline will be the beneficiaries of this sale. MDU is the distributing company in these towns. As a public utility it is subject to the statutory rate regulation powers of the

North Dakota Public Service Commission.[8] In further contrast to the picture painted by the Commission in *Lo-Vaca*, the North Dakota Public Service Commission, as a matter of *actual practice*, zealously safeguards the interest of the gas consumer by regulating the rates charged by MDU.[9] Yet at the same time it recognized the importance of making this gas available to MDU customers and accordingly intervened in the proceedings below before the Commission "in support of" MDU's application (R. 2).

The Commission itself recognizes these to be vital distinctions because *at no stage in these proceedings* has it ever argued that there will be a "regulatory gap." It frankly concedes this when in its brief on the merits before this Honorable Court in *Lo-Vaca* (Case No. 57) it says:

> ". . . in the case of a sale to an interstate pipeline for resale within the same State (as in *North Dakota*), the absence of federal jurisdiction would not inevitably permit the transaction to go entirely unregulated, since the State in question would have a strong in-

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8. NDCC 49-02-03. Power of public service commission to establish rates.—The Commission shall supervise the rates of all public utilities. It shall have the power, after notice and hearing, to originate, establish, modify, adjust, promulgate, and enforce tariffs, rates, joint rates, and charges of all public utilities. Whenever the commission, after hearing, shall find any existing rates, tariffs, joint rates, or schedules unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any of the provisions of this title, the commission by order shall fix reasonable rates, joint rates, charges, or schedules to be followed in the future in lieu of those found to be unjust, unreasonable, insufficient, unjustly discriminatory, or otherwise in violation of any provision of law.

9. *Public Service Commission of North Dakota* v. *Montana-Dakota Utilities Company*, 100 N.W.2d 140 (1959).

terest in regulating the sale for the protection of its own resident consumers.

* * *

"In sum, the practical considerations which add force to the legal argument for federal jurisdiction in the present case were very largely absent in *Hastings* and *North Dakota*." (Comm. Br. 33-34).

The Commission's parting shot in its petition for certiorari in *Lo-Vaca* was a quotation from this Court's opinion in *Federal Power Commission* v. *Transcontinental Gas Pipeline Corporation*, 365 U.S. 1, 28, which reads:

"Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation." (Pet. 20)

As we have shown, the situation referred to by this Honorable Court in that case plainly does not exist in the case at bar. Because there is no "regulatory gap" the decision below does not impair the Commission's administration of the Natural Gas Act and yet the consumer is fully protected by state regulation. Thus, the case at bar, though important to the litigants involved, is not a matter of national public interest warranting review by this Court.

Gas Sold under the North Dakota Contract Will Not Flow Out of the State. In its petition for certiorari in *Lo-Vaca*, the Commission told this Honorable Court:

"The Commission asserted jurisdiction here not, as the court below suggests . . . merely because the gas proposed to be supplied by Houston and Lo-Vaca would travel through the same pipe line with gas destined for resale in interstate commerce, but be-

cause a large but indeterminate part of the Houston and Lo-Vaca gas would itself be resold in interstate commerce, notwithstanding the 'restricted use' provisions in the contracts." (Pet. 18)

Both the facts and the contracts make that indictment totally inappropriate in the case at bar. On a peak winter day Amerada and Signal will sell 55,000 Mcf of gas to MDU (R. 8). Of that volume 50,000 Mcf will flow to the *east*, will *not* be commingled with gas from any "other sources," and will be *wholly consumed* by the North Dakota towns located along MDU's line; not *one* Mcf will flow across the border into Montana (R. 7, 29). The Commission *concedes* this to be true (Pet. 6). After leaving the Tioga plant, 5,000 Mcf will travel *westward* and will be commingled with 15,000 Mcf supplied by Hunt-Herbert and TXL (R. 7, 8, 29). Of this volume, 10,200 Mcf will be consumed in North Dakota (R. 233).

Thus, *none* of the gas moving *east* will be commingled with the gas from Hunt-Herbert or TXL which are the "other sources" which the Commission contends distinguishes the case at bar from North Dakota (Pet. 17 Lo-Vaca) and *none* of the gas that flows east—let alone a "large but indeterminate part" will ever reach the Montana border; it will all be consumed within the state (R. 29). In the summer time only the volumes consumed in the towns along the way will be sold under the North Dakota Contract; all volumes flowing into Montana for storage will be sold under the Interstate Contract, which we admit is a sale for resale and is fully regulated by the Commission.

Certainly the 5,000 Mcf of gas moving *west* from Tioga is not a "large but indeterminate" amount. Further, Amerada's North Dakota Contract provides that all gas

purchased under it "shall be transported, used and consumed *entirely* within the State of North Dakota" and that it "shall not at any time cover the sale or delivery by Amerada of any gas which is transported beyond the boundaries of the State of North Dakota." (R. 130, 132).

Amerada's President did not admit, as the Commission says Houston's President did, that gas sold under its North Dakota contract would be used outside the state (Pet. 6 Lo-Vaca). And our contract provisions will be fully implemented by a comprehensive metering system which will measure the quantity of gas which flows from the Tioga plant so that the "amount of North Dakota gas which is consumed in North Dakota, before leaving the state, will be separated . . . and will be measured at each town gate before any portion . . . leaves the state." (R. 4). Thus, "we will know the quantity of gas which is *produced* in North Dakota and withdrawn from each branch of the main line and which is *consumed* in North Dakota *before it leaves the state*" (R. 4). The record is totally devoid of any evidence—and the Commission has cited no record reference in support of its contention—that any gas which crosses the Montana border will be *sold* under the North Dakota contract; indeed it cannot be. All gas which reaches Montana will be *sold* under Amerada's Interstate Contract.[10]

Amerada's North Dakota Contract Makes Gas Available to Additional Consumers. It is contended in the Commission's petition for certiorari in *Lo-Vaca* that:

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10. The Interstate Contract provides: "Notwithstanding anything else in this agreement contained, all gas produced in the Contract Area which is sold and delivered by Amerada to Buyer and which is transported outside of the State of North Dakota and resold shall be sold by Amerada and purchased by Buyer under this agreement" (R. 105).

> ". . . these two contracts could have no conceivable purpose or effect other than to avoid federal jurisdiction. Their removal from the Houston and Lo-Vaca contracts, and their insertion in the contracts of other suppliers, would not require the slightest change in El Paso's actual operations or in the routing of gas through its system." (Pet. 14-15).

Once again we find a significant reason urged upon this Court in *Lo-Vaca*, which is totally absent from the case at bar. Amerada's legitimate business purpose and MDU's need for the gas sold under Amerada's North Dakota contract, together with the gas sold under its Interstate Contract, has never been questioned. Amerada and Signal gas *only* flows through the new 106 mile line from Minot to Bismarck; not *one* molecule of Hunt-Herbert or TXL gas is commingled therein. Hundreds of North Dakota consumers, fully protected by state regulation, now have gas available to them which would not have been available if these transactions had not been worked out. And the importance of getting *new* gas available to *new* consumers in *unserved* areas has been highlighted recently by Chairman Swidler's call for a meeting on November 20 of the Natural Gas Advisory Council where the *first* item on the agenda is "Progress and problems of the industry in extending gas service to *unserved communities*."[11]

The Decision Below Was Correct. In the Court below the Commission sought to avoid the precedential and binding effect of *North Dakota*, decided in 1957 by the 8th Circuit, by urging its "one source" theory, which in a nutshell is: if *intrastate* gas is commingled in a pipeline having two or more sources of *interstate* gas, the *intrastate* gas becomes subject to the jurisdiction of the Federal Power Commission.

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11. Federal Power Commission Press Release No. 13507 dated October 20, 1964.

The Court below regarded this theory as totally fallacious. Indeed no court, to our knowledge, has ever enunciated such a theory. And for good reason, when one stops to consider the untenable legal consequences which would flow from such a theory. In the case at bar, the TXL and Hunt-Herbert contracts were executed approximately three months *after* the execution of the Amerada and Signal contracts. Suppose, however, that the TXL and Hunt-Herbert contracts had not been executed until some 18 months after Amerada and Signal executed their contracts; that in the meantime the Amerada and Signal applications for authority to sell their interstate gas had been approved by the Commission; that consistent with the contention which the Commission makes today (that Amerada and Signal constitute but "one source") the Commission had *not* asserted jurisdiction over the North Dakota contracts; and that deliveries had commenced under all four contracts. When TXL and Hunt-Herbert received Commission approval to sell gas 18 months later and started deliveries, it would then be commingled with the Amerada and Signal gas flowing to the west.

Presumably under the Commission's theory, instantaneously upon the happening of this event, Amerada's *intrastate* gas would become transformed into *interstate* gas. Thus, based upon totally *extraneous* circumstances, over which Amerada would have no control, the Commission could, and presumably would, because a new "source" had been added, assert jurisdiction. No wonder the Commission has not found even one opinion articulating its unfounded contention.

Professor Sullivan, in his recent comprehensive and analytical critique of the gas commingling cases, decided both before and after the passage of the Natural Gas Act

in 1938, states his conclusion concerning the state of American law as follows:

> "Where commingled intrastate and interstate volumes were involved, divisibility by calculation of volumes alone was sufficient to determine attaching of *federal* or *state* jurisdiction to a given quantity. Since the passage of the Act, decisions of the Commission with respect to jurisdiction over 'commingled' volumes and sales involving commingled volumes have vacillated. The *courts have continued to hold* that sales off an interstate transmission line *before* the line leaves the state of production and for consumption within the state of production are sales in intrastate commerce, even though the major portion of the quantity in the line is destined for interstate transmission."[12]

II.

The Decision Below Can Be Sustained on a Non-Federal Ground.

Although the Commission prevailed before the Eighth Circuit in *North Dakota*, a majority of the Commission has now turned its back on that decision, has refused to follow it or to be bound by it, has said that it "failed to take appropriate account" (R. 254) of certain facts and "was erroneously decided."[13]

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12. Sullivan, Federal Power Commission Jurisdiction over Commingled Sales of Natural Gas: A Problem in Judicial and Administrative Legislation, 30 Geo. Wash. L. Rev. 638 (1962).

13. *Lo-Vaca Gathering Company*, 26 FPC 606, 615 (1961). This is not the first time in recent years in which the Commission has refused to follow the law as announced by a Court of Appeals. When asked to follow a decision by the Court of Appeals for the 5th Circuit, it flatly refused saying: "Whatever the general effect of that decision, we believe that it was incorrectly decided. In any event, *we are not bound* by the decision of *one circuit*, and the Examiner should not consider himself bound." *Cities Service Gas Co.*, 26 FPC 665, 666 (1961).

The immediate reaction upon reading these opinions, by one schooled in the common law, is: By what authority does the Commission arrogate unto itself the power to "overrule" the Court of Appeals for the Eighth Circuit? One searches the Commission's opinion in vain for an answer. This was disturbing to Commissioner Woodward, who in his dissent, said:

> ". . . by what principles of constitutional law and statutory construction does the majority equate their position with the mandate of the Supreme Court of the United States and other Federal and State courts . . ."? (R. 262.)

We urged below, both before the Commission and the Court of Appeals, that because the issue was the *same*, the parties were the *same*, and the material facts were the *same*, the Commission was bound by the doctrine of *res judicata* or collateral estoppel. The Court below agreed, saying:

> "In our former opinion we fully adjudicated and decided the same issue recurring now under equivalent circumstances that the Commission lacks jurisdiction to regulate gas produced, sold, and consumed intrastate, which is transported in a pipeline commingled with interstate gas and that decision as between these parties bars resurrection of the issue again." (334 F.2d 404, 412).

This is a wholly separate, distinct and non-federal ground upon which the decision below can be sustained. It does not involve a constitutional question. It simply rests on a fundamental tenet of the common law.

In *The Northern Pacific Railroad Company* v. *Ellis*, 144 U.S. 458 (1892), this Court dismissed a writ of error directed to the Supreme Court of Wisconsin because its decision could be supported on the non-federal ground of *res judicata*, saying:

> "The judgment before us was rendered in accordance with well settled principles of *general law, not involving any Federal question*, . . ." (144 U.S. 458, 465 (1892)).

Furthermore, in *General Talking Pictures Corporation* v. *Western Electric Company, Inc.*, 304 U.S. 175, a case involving the doctrine of *estoppel*, this Court denied certiorari, saying:

> "There is nothing in the lower courts' decision on either of the added questions to warrant review here. Whether respondents acquiesced in the infringement and are *estopped* depends upon the facts. Granting of the writ *would not be warranted merely to review the evidence or inferences drawn from it.*" (304 U.S. 175, 178).

The Commission seeks to avoid the decision by the Court below, arguing that if the former *North Dakota* case is held to be incorrectly decided by this Honorable Court (in Lo-Vaca) then there should be a change in the "legal atmosphere" which would make the doctrine of collateral estoppel inapplicable (Pet. 9). We respectfully submit that this Court alone—not the Commission—has the power to bring about a change in "legal atmosphere." As the Court below so aptly observed, there has been "no *intervening* change in the prevailing law" (334 F.2d 404, 411). And certainly the Commission's flouting of the 8th Circuit's opinion does not constitute a change in "legal atmosphere" which will bar the application of the doctrine of collateral estoppel. The *Sunnen* case[14] relied on by the Commission, makes it clear that even in tax matters, any change in "legal atmosphere" which might bar the application of the doctrine must be the result of a "*judicial*

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14. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1948).

declaration *intervening* between the two proceedings . . ." (333 U.S. 591, 600).

CONCLUSION

We respectfully submit that the Commission's petition is not "certworthy"; we pray that this Honorable Court deny that petition and decline to hold the matter in abeyance pending a determination of *Lo-Vaca*.

Respectfully submitted,

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